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In the

Supreme Court of the United States.

October Term, 1929.

No. 42

UNITED STATES OF AMERICA, Petitioner,

v.

BOSTON BUICK COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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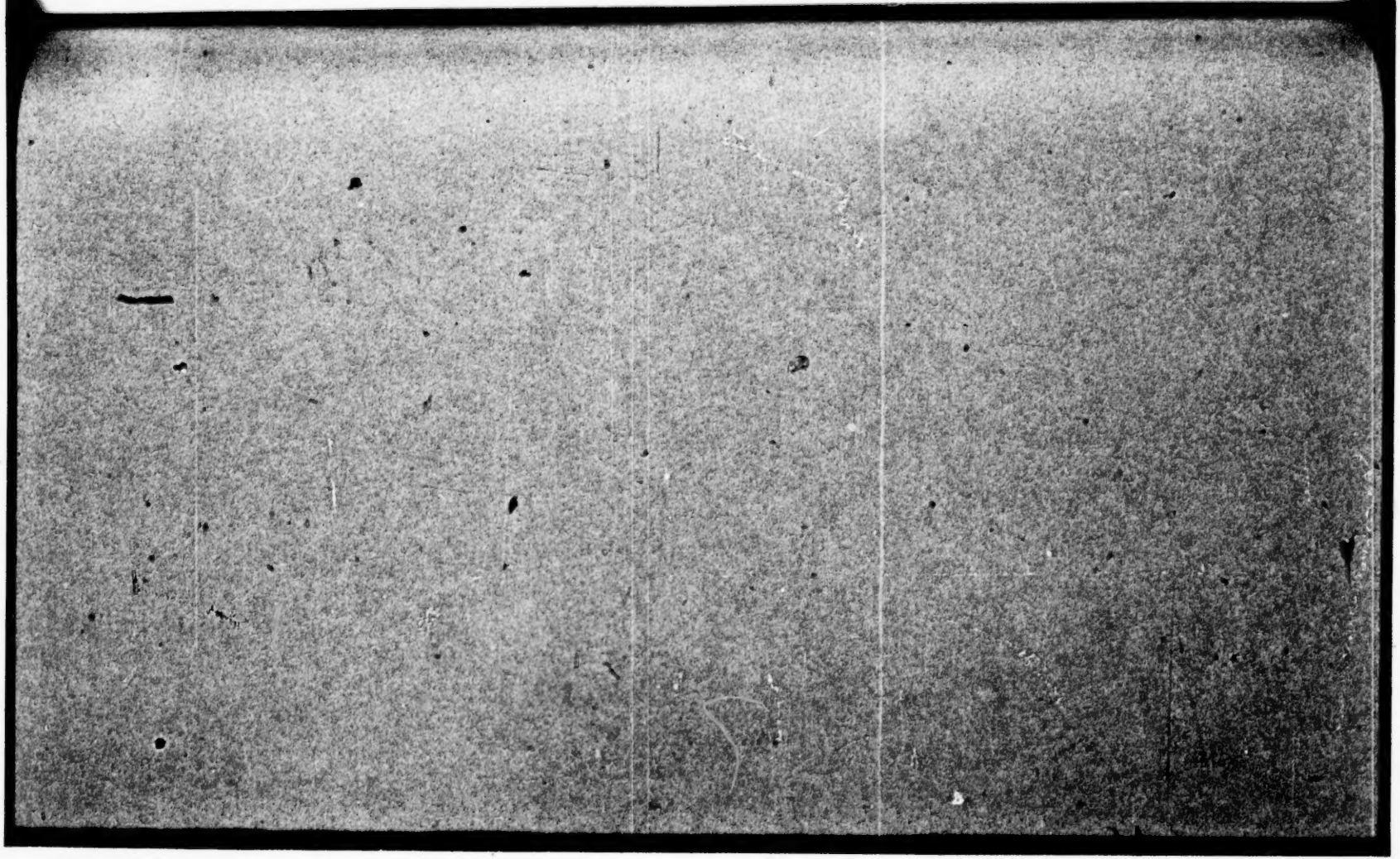

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No. 632.

UNITED STATES OF AMERICA, PETITIONER,

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BOSTON BUICK COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the First Circuit (R. 22-26) is reported in 35 F. (2d) 560.

The opinion of the District Court for the District of Massachusetts (R. 15-18) is reported in 27 F. (2d) 395.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the First Circuit was entered on November 5, 1929 (R. 22-26).

The jurisdiction of this court rests upon the provisions of section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

Prior to the passage of the Revenue Act of 1924, *i.e.*, on March 14, 1924, the Commissioner of Internal Revenue determined that an overassessment had been made with respect to respondent's taxes for the year 1918, and forwarded to the Collector a "Schedule of Overassessments," directing the Collector to examine the taxpayer's account and determine whether the amount of such overassessment should be abated, and if any part of the overassessment was found to be an overpayment, to examine all accounts of taxpayer for other years and apply the overpayment as a credit against taxes, if any for such other years, and to thereupon complete and certify such schedule, together with another schedule, entitled "Schedule of Refunds and Credits" (Form 7805-A), and return the necessary copies of each to the Commissioner. Each of these schedules called for a certification by the Collector to the Commissioner with respect to credits as well as refunds (Ex. A, R. 8).

Subsequent to the passage of the Revenue Act of 1924, *i.e.*, on July 11, 1924, the Collector acted upon said schedules, ascertained from an examination of taxpayer's accounts that the total amount of said overassessment constituted an overpayment, certified to the Commissioner on Form 7805-A (Ex. B, R. 8) that "an examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions in tax liability subject to refund or credit," and returned both schedules to the Commissioner (R. 8, Ex. B).

Thereafter, on July 31, 1924, the Deputy Commissioner certified to the Commissioner with reference to the refundable portions of the overassessments appearing on said schedule and accrued interest, if any, and the Commissioner authorized the Disbursing Clerk of the Treasury Department to pay the same (R. 8, Ex. B). There was no amount

refundable to respondent, as the entire amount of the overassessment in its favor was applied as credits against taxes due for other years (R. 8, 9). The attention of the court is directed to the fact that, although the photostatic copy of Exhibit B (R. 8) has failed to reproduce the signatures of the Deputy Commissioner and Commissioner, the respective certificates were, in fact, signed by them, as appears in the statement of the case in the Government's petition, at page 3, and as was orally stated by the Government's counsel to the court below during the argument of the case.

Question Presented.

The sole question presented is—

Whether interest on the credits should be computed under section 1324 (a) of the Revenue Act of 1921 or under section 1019 of the Revenue Act of 1924, which question depends, in turn, upon whether the credits were "allowed" before or after June 2, 1924, the effective date of the Revenue Act of 1924.

Statutes Involved.

Revenue Act of 1921; 42 Stat. 316.

"Sec. 1324 (a). That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not

paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

Revenue Act of 1924; 43 Stat. 253.

"Sec. 1019. Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

Argument.

It has been decided by this court in the cases of *Blair* v. *United States, ex rel. Birkenstock et al.*, 271 U.S. 348, *and United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, that the law in force at the time of the *allowance* of a refund governed the amount of interest payable.

The first case involving the question as to when the date of "allowance" occurred was *Girard Trust Co.* v. *United States*, 270 U.S. 163. In that case the Government contended, as it does here, that the date of allowance was the date when the Commissioner first signed the Schedule of Overassessments forwarded to the Collector. The Regulations at that time provided as follows:

"A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund."

This court overruled the Government's contention and decided that this regulation was invalid. In its opinion this court said (pp. 170, 171):

"We can not concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue who made the collection and keeps the account with the taxpayer. The findings and the exhibits show that the course of business is that the collector, on receiving from the Commissioner the schedule as to the overassessment, examines his books and reports back to the Bureau the *amount which should be credited* on taxes and the *amount to be refunded;* that this is examined by the Assistant Commissioner and then is delivered to the Commissioner, *who makes it effective by his approval.* Until it reaches him and is approved by him, the refund can not be paid. This, we think, is the real date of allowance. *Until that time the exact amount of the refund is not fixed finally by competent authority.* This date would seem to be just as certain and convenient from an administrative standpoint as that of the original decision of the Commissioner, and *it is certainly more in conformity to the general purpose of Congress to relieve the overassessed taxpayer by paying compensatory interest on money unjustly taken and kept by the Government.*" (Italics supplied.)

> Again (p. 170): "The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund *or credit* should be granted and when he has made that decision finally, he has allowed the claim for the refund *or credit* of the taxes paid within the meaning of the Section." (Italics supplied.)

It should be noted that the form of the Schedule of Overassessments in the instant case is substantially the same as that before this court in the *Girard Trust Company* case, and is identical with the one involved in *Blair* v. *United States, ex. rel. Birkenstock*, in which the *Girard Trust Company* case was followed.

In the instant case the Government claims that, while the above case settles the question of the date of allowance of a refund, it does not apply to the case of a *credit*. The contention of the respondent is that it applies with equal force to a credit as well as a refund.

There is no doubt that when the Commissioner signed the Schedule of Overassessments on March 14, 1924, it constituted his decision that an *overassessment* had been made. It is also equally clear that at that time the Commissioner did not decide that either a *refund* or *credit* should be granted. In both these respects the facts in the *Girard Trust Company* case and in the instant case are identical.

It is plain from the instructions of the Commissioner to the Collector appearing on the Schedule of Overassessments (Ex. A, R. 8) that the Commissioner did not know at the time he signed such schedule whether the overassessment would result in either a refund or a credit. It will be noted that the instructions to the Collector required him first to check the *overassessment* against the account of the taxpayer and determine whether there had been an *overpayment*. The instructions then provided as follows:

"*If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts.* Such credits will be entered in Column 9, and placed in Column 5 of a subsidiary Schedule of Refunds and Credits (Form 7805-A).

"The balance, if any, of the overpayment will be entered in Column 12, and placed in Column 4 of the subsidiary schedule (Form 7805-A) referred to above, and an appropriate memorandum made upon the taxpayer's accounts.

"You will thereupon complete and certify this schedule and the schedule upon Form 7805-A, and return the necessary copies of each to the Commissioner of Internal Revenue." (Italics supplied.)

An item appearing in the Schedule of Overassessments might result in a refund or in a credit, or might not result in either. If a particular item is later found to result in a refund, it is settled by the *Girard Trust Company* case, *supra*, that allowance of the same was not made on March 14, when the Commissioner signed the Schedule of Overassessments, and it would seem that the Government must take the position that the question of whether a particular item appearing therein is "allowed" when the Commissioner signed the schedule cannot be determined at that time, but must await the ultimate finding by another official of certain facts not then known to the Commissioner and which would not, in the normal course of events, be ascertained for several months thereafter. The statement of this position demonstrates its unsoundness. It is clearly open to the same objections stated by the court in *Girard Trust Company* v. *United States*, *supra*, at p. 171, that "the exact amount of the refund is not fixed finally by competent authority" and that it is not "in conformity to the

general purpose of Congress to relieve the overassessed taxpayer by paying compensatory interest on money unjustly taken and kept by the Government."

The question here presented was before the Court of Claims in the case of *Swift & Co.* v. *United States* (unreported, May 6, 1929). In that case the court held as follows:

> "It should be observed that the Government made the same contention, on the point under discussion, in the *Girard Trust Company case*. It is true that only refunds were directly involved in the *Girard Trust Company case*, but the court seems to have placed credits and refunds on the same footing, so far as the date of allowance is concerned. In defining what constitutes an allowance of a claim for refund or credit, the court stated:
>
> " 'The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision *finally*, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section.' (Italics ours.)
>
> "The Government in its brief presented that case on the theory that no difference existed between a credit and a claim for refund in the matter of the date of the allowance. It is stated in said brief:
>
> " '. . . and the date of the allowance of the claim, that is, the date of adjudication of his right to *credit* or *refund*, remains the date of the approval of the original schedule.'
>
> "The schedule is nothing more nor less than a statement of credits as well as refunds found by the collector to be due the taxpayers named therein. The opinion in the *Girard Trust Company case*, *supra*, referring to the collector's report as to the amount which should

be credited on taxes due for other years, and the amount to be refunded, states (p. 171):

"'that this is examined by the assistant Commissioner and then is delivered to the Commissioner, who *makes it effective by his approval.*' (Our italics.)

"The commissioner 'is the final judge in the administrative branch of the Government to decide . . . that a refund or credit should be granted.' No other administrative officer has such authority. The commissioner's decision that there has been an overassessment is one thing; the determination that there has been an overpayment is quite another. This can not be determined by the commissioner until he is informed by the collector what part, if any, of the overassessment had been paid, and what part, if any, had been abated. . . .

"We have reached the conclusion that the credit involved herein was allowed within the meaning of the statute when the commissioner signed the schedule of refunds and credits as reported by the collector, which was September 6, 1923, and within four years from the filing of the second claim for refund."

There is no decision by any Circuit Court of Appeals in conflict with the decision in the instant case.

Attention has been called in petitioner's brief to the decision in the case of *Penn Smokeless Coal Co.* v. *United States*, in the District Court for the Western District of Pennsylvania, 34 F. (2d) 205, in which the court reached an opposite conclusion. That decision must be considered of very questionable value, however, on account of the unfortunate error into which the court fell, as pointed out by the Court of Claims in *Swift & Co.* v. *United States*, *supra*, in the following language:

"It is the contention of the Government that the credit was *allowed* on February 9, 1923, when the Com-

missioner of Internal Revenue certified the overassessment to the collector. This contention seems to be based on the decision in the *Penn Smokeless Coal Co.* v. *United States*, in the District Court of the United States for the Western District of Pennsylvania, decided January 3, 1929. It will be noticed that the real controversy in that case was over the question as to when the credit was 'taken.' It was agreed between counsel, as shown by the briefs, that 'a credit is allowed when the Commissioner approves the schedule of overassessments for transmission to the proper accounting officer for credit.' That point was therefore not the subject of argument. We think counsel were in error in agreeing that such was the correct principle. At any rate, it should be noticed that the court itself fell into an unfortunate error in its discussion of the case. It is stated:

" 'In *Girard Trust Company* v. *United States, supra* (270 U.S. 163), the court, in the opinion of Mr. Chief Justice Taft, laid down a rule as follows: "*A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund.*" . . . Applying the rule laid down in *Girard Trust Company* v. *United States* to the actual procedure in the Bureau of Internal Revenue, the credit to the plaintiff was allowed when the Commissioner approved the schedule of overassessments on January 13, 1926, for transmission to the collector.' (Italics ours.)

"The matter quoted above was not a rule laid down by Chief Justice Taft. It was a reference by the Chief Justice to a Treasury regulation and was cited only for the purpose of expressing his emphatic disapproval of the principle embodied therein, which he did in the following language:

"'We can not concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue who made the collection and keeps the account with the taxpayer.'

"Inasmuch as the decision in the *Penn Smokeless Coal Co. case* is based, in a large measure, upon a palpably erroneous premise it must be considered as of questionable value as a precedent in the present case."

No further criticism of the *Penn Smokeless Coal Co.* case need be made except to point out the fallacy in the statement of the court that "the order upon the Collector for the credit, made in the schedule of overassessments, is just as effective in allowance of the credit as the order upon the Disbursing Clerk for the payment of the refund from the Treasury."

It must be apparent that these acts are fundamentally different in the following vital respects:

(1) At the time the order is made upon the Disbursing Clerk for the payment of the refund (to use the words of this court in *Girard Trust Co.* v. *United States, supra*), "the exact amount of the refund" has been "fixed finally by competent authority." On the other hand, at the time the authorization to the Collector is given, as contained in the Schedule of Overassessments, the exact amount of the refund or credit has not been fixed finally. Indeed, it has not then been determined whether the *overassessment* will result in any *credit* or *refund* at all.

(2) The order upon the Disbursing Clerk is an *unconditional* order for the payment of money, not dependent upon any contingency whatever. The instructions to the Collector, on the contrary, require him to make a preliminary finding, after examination of the taxpayer's records, as to

whether there has been an *overpayment*, and to report his findings back to the Commissioner.

The principal reason advanced in petitioner's brief for the granting of a writ of certiorari appears to be that the certificate which the Commissioner signed to the Disbursing Clerk after the schedules had been returned by the Collector covered only refunds, together with such interest as may have accrued on either refunds or credits, and had no reference to credits as such, and that, therefore, the credits appearing on such schedules were not thereby allowed by the Commissioner; and the argument is made that since, in certain cases where no refunds are to be made and no interest is payable, the Schedule of Refunds and Credits (Form 7805-A) is not signed by the Commissioner after its return by the Collector, the decision of the court below would result in the liability of taxpayers being reduced by the action of the Collector in the application of credits prior to, and, in some instances, without any allowance by the Commissioner.

It is submitted that the above reasoning takes too literal a view of the matter. The important thing is the *approval* by the Commissioner. As was stated by this court in the *Girard Trust Company* case, *supra*, the schedule upon its return from the Collector "is examined by the Assistant Commissioner and then is delivered to the Commissioner, who makes it effective by his approval." That such approval was given necessarily follows from the entire course of procedure in this case—even though the authorization to the Disbursing Clerk expressly referred only to refunds. The Collector's action in entering the credit upon his books was tentative only and subject to the subsequent approval of the Commissioner. Petitioner has called attention to the language of the "Certificate of Collector" on Form 7805, (Ex. A, R. 8), which states that the amounts indicated have been "applied" as credits upon the respective accounts,

but it will be noted that the "Certificate of Collector" on Form 7805-A (Ex. B, R. 8) states the amounts listed to be "*subject* to refund or credit." Under the facts in this case it is plain that the entries made by the Collector in his books do not constitute a final allowance. He is required to report back to the Commissioner, after he has ascertained the facts concerning the taxpayer's account, the amount of overpayment, amount of credit, and the due dates of the items against which credits were made (Ex. A, R. 8). It cannot be assumed that this is an empty formality. The only reasonable interpretation of this procedure is that this report is required for the purpose of enabling the Commissioner to determine the correctness of the Collector's findings before giving his final approval. For example, the propriety of crediting an overpayment of taxes for one year against an unpaid assessment for another year depends upon whether the unpaid assessment is legally collectible, in whole or in part. The determination of that question can only be made by the Commissioner, and, being judicial in its nature, cannot be delegated to the Collector.

Conclusion.

It is respectfully submitted that the question here sought to be reviewed has been settled by the decision of this court in *Girard Trust Company* v. *United States*, *supra*, that the decision of the Circuit Court of Appeals was in conformity with that decision, and that the petition for a writ of certiorari should be denied.

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